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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 PAMELA K. HOWES,)
7 Plaintiff,) No. CV-08-00232-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on June 8, 2009. (Ct. Rec. 20,
15 25). Attorney Maureen J. Rosette represents Plaintiff; Special
16 Assistant United States Attorney Willy M. Le represents the
17 Commissioner of Social Security. The parties have consented to
18 proceed before a magistrate judge. (Ct. Rec. 9.) Plaintiff filed
19 a reply on May 28, 2009. (Ct. Rec. 27.) After reviewing the
20 administrative record and the briefs filed by the parties, the
21 court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 25)
22 and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 20).

23 **JURISDICTION**

24 Plaintiff protectively filed an application for supplemental
25 security income (SSI) benefits on April 15, 2004, alleging
26 degenerative disc disease, status post bilateral shoulder
27 reconstruction, status post carpal tunnel release, depression, and
28 anxiety. (Tr. 103-105.) Plaintiff amended the onset date to April

1 15, 2004, at the August 23, 2007, following the Appeals Council's
2 remand. (Tr. 604.) The application was denied initially and on
3 reconsideration. (Tr. 66-69, 72-73.)

4 The first hearing before Administrative Law Judge (ALJ),
5 Richard A. Say took place June 14, 2006. Plaintiff, represented
6 by counsel, and vocational and vocational expert Daniel R.
7 McKinney testified. (Tr. 617-641.) On July 12, 2006, the ALJ
8 issued his first unfavorable decision. (Tr. 43-51.) As noted,
9 the Appeals Council vacated the decision and remanded for further
10 proceedings. (Tr. 54-56.) A supplemental hearing was held on
11 August 23, 2007. Plaintiff and VE Tom L. Moreland testified.
12 (Tr. 598-614.) On September 20, 2007, the ALJ issued an
13 unfavorable decision. (Tr. 20-32.)

14 The Appeals Council received additional evidence and denied
15 review on July 24, 2008. (Tr. 9-12.) Therefore, the ALJ's decision
16 became the final decision of the Commissioner, which is appealable
17 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
18 filed this action for judicial review pursuant to 42 U.S.C. §
19 405(g) on July 23, 2008. (Ct. Rec. 1, 4.)

20 **STATEMENT OF FACTS**

21 The facts have been presented in the administrative hearing
22 transcripts, the ALJ's decision, the briefs of both Plaintiff and
23 the Commissioner, and are summarized here.

24 Plaintiff was 46 years old on the date of the hearing and
25 decision. (Tr. 600.) She has a high school education and earned
26 three A.A.S. degrees in 1994. (Tr. 139, 619.) Plaintiff has
27 worked as a home attendant and housekeeper. (Tr. 605-606.) She
28 testified she can drive about 30 miles. (Tr. 633.) She can sit

1 in a chair 10-15 minutes before having to move. (Tr. 629.) She
2 needs to lay down 5 to 6 times a day for 2 to 3 hours each time.
3 (Tr. 629-630.) Plaintiff can stand 10 to 15 minutes and walk nine
4 blocks. (Tr. 630.)

5 SEQUENTIAL EVALUATION PROCESS

6 The Social Security Act (the "Act") defines "disability"
7 as the "inability to engage in any substantial gainful activity by
8 reason of any medically determinable physical or mental impairment
9 which can be expected to result in death or which has lasted or
10 can be expected to last for a continuous period of not less than
11 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
12 Act also provides that a Plaintiff shall be determined to be under
13 a disability only if any impairments are of such severity that a
14 plaintiff is not only unable to do previous work but cannot,
15 considering plaintiff's age, education and work experiences,
16 engage in any other substantial gainful work which exists in the
17 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
18 Thus, the definition of disability consists of both medical and
19 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
20 (9th Cir. 2001).

21 The Commissioner has established a five-step sequential
22 evaluation process for determining whether a person is disabled.
23 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
24 is engaged in substantial gainful activities. If so, benefits are
25 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
26 not, the decision maker proceeds to step two, which determines
27 whether plaintiff has a medically severe impairment or combination
28 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),

1 416.920(a)(4)(ii).

2 If plaintiff does not have a severe impairment or combination
3 of impairments, the disability claim is denied. If the impairment
4 is severe, the evaluation proceeds to the third step, which
5 compares plaintiff's impairment with a number of listed
6 impairments acknowledged by the Commissioner to be so severe as to
7 preclude substantial gainful activity. 20 C.F.R. §§
8 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
9 App. 1. If the impairment meets or equals one of the listed
10 impairments, plaintiff is conclusively presumed to be disabled.
11 If the impairment is not one conclusively presumed to be
12 disabling, the evaluation proceeds to the fourth step, which
13 determines whether the impairment prevents plaintiff from
14 performing work which was performed in the past. If a plaintiff
15 is able to perform previous work, that Plaintiff is deemed not
16 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
17 At this step, plaintiff's residual functional capacity (RFC)
18 assessment is considered. If plaintiff cannot perform this work,
19 the fifth and final step in the process determines whether
20 plaintiff is able to perform other work in the national economy in
21 view of plaintiff's residual functional capacity, age, education
22 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
23 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon plaintiff to establish
25 a *prima facie* case of entitlement to disability benefits.
26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
27 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
28 met once plaintiff establishes that a physical or mental

1 impairment prevents the performance of previous work. The burden
2 then shifts, at step five, to the Commissioner to show that (1)
3 plaintiff can perform other substantial gainful activity and (2) a
4 "significant number of jobs exist in the national economy" which
5 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
6 Cir. 1984).

7 STANDARD OF REVIEW

8 Congress has provided a limited scope of judicial review of a
9 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
10 the Commissioner's decision, made through an ALJ, when the
11 determination is not based on legal error and is supported by
12 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
13 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
14 1999). "The [Commissioner's] determination that a plaintiff is
15 not disabled will be upheld if the findings of fact are supported
16 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
17 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
18 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
19 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
20 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
22 573, 576 (9th Cir. 1988). Substantial evidence "means such
23 evidence as a reasonable mind might accept as adequate to support
24 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
25 (citations omitted). "[S]uch inferences and conclusions as the
26 [Commissioner] may reasonably draw from the evidence" will also be
27 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
28 On review, the Court considers the record as a whole, not just the

1 evidence supporting the decision of the Commissioner. *Weetman v.*
2 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
3 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
6 evidence supports more than one rational interpretation, the Court
7 may not substitute its judgment for that of the Commissioner.
8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
9 (9th Cir. 1984). Nevertheless, a decision supported by
10 substantial evidence will still be set aside if the proper legal
11 standards were not applied in weighing the evidence and making the
12 decision. *Browner v. Secretary of Health and Human Services*, 839
13 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
14 evidence to support the administrative findings, or if there is
15 conflicting evidence that will support a finding of either
16 disability or nondisability, the finding of the Commissioner is
17 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
18 1987).

19 **ALJ'S FINDINGS**

20 The ALJ found at step one that plaintiff has not engaged in
21 substantial gainful activity since onset. (Tr. 22.) At steps two
22 and three, the ALJ found that plaintiff suffers from degenerative
23 disc disease status post fusion at L5-S1, status post bilateral
24 shoulder reconstruction, status post carpal tunnel release,
25 depression, and anxiety, impairments that are severe but which do
26 not alone or in combination meet or medically equal a Listing
27 impairment. (Tr. 22, 27.) The ALJ found plaintiff less than
28 completely credible. (Tr. 29-30.) At step four, relying on the

1 VE, the ALJ found plaintiff is unable to perform past relevant
2 work. (Tr. 31.) At step five, again relying on the VE, the ALJ
3 found plaintiff can perform other work, such as small products
4 assembly, cashier II, laundry worker and ticket seller. (Tr. 32.)
5 Because the ALJ found plaintiff could perform work, she was found
6 not disabled at step five. Accordingly, the ALJ found that
7 plaintiff is not disabled as defined by the Social Security Act.
8 (Tr. 32.)

9 ISSUES

10 Plaintiff contends that the Commissioner erred as a matter of
11 law by failing to properly weigh the opinions of (1) treating
12 physicians Michael Sikora, M.D., and H. Graeme French, M.D.; (2)
13 VE Robert Cornell, and (3) examining psychologist Dennis Pollack,
14 Ph.D. (Ct. Rec. 21 at 13-19.) The Commissioner responds that
15 the ALJ appropriately weighed the evidence asks the Court to
16 affirm his decision. (Ct. Rec. 26 at 6-7.) Following remand from
17 the Appeals Council, the ALJ was directed to adequately evaluate
18 Dr. Sikora's opinions, limit consideration of past relevant work
19 to jobs performed in the past 15 years, and obtain an updated VE's
20 opinion. (Tr. 54-55.)

21 DISCUSSION

22 In social security proceedings, the claimant must prove the
23 existence of a physical or mental impairment by providing medical
24 evidence consisting of signs, symptoms, and laboratory findings;
25 the claimant's own statement of symptoms alone will not suffice.
26 20 C.F.R. § 416.908. The effects of all symptoms must be
27 evaluated on the basis of a medically determinable impairment
28 which can be shown to be the cause of the symptoms. 20 C.F.R. §

1 416.929. Once medical evidence of an underlying impairment has
2 been shown, medical findings are not required to support the
3 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
4 341, 345 (9th Cir. 1991).

5 A treating physician's opinion is given special weight
6 because of familiarity with the claimant and the claimant's
7 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
8 Cir. 1989). However, the treating physician's opinion is not
9 "necessarily conclusive as to either a physical condition or the
10 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
11 751 (9th Cir. 1989) (citations omitted). More weight is given to
12 a treating physician than an examining physician. *Lester v.*
13 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
14 weight is given to the opinions of treating and examining
15 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
16 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
17 physician's opinions are not contradicted, they can be rejected
18 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
19 If contradicted, the ALJ may reject an opinion if he states
20 specific, legitimate reasons that are supported by substantial
21 evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44
22 F. 3d 1435, 1463 (9th Cir. 1995).

23 In addition to the testimony of a nonexamining medical
24 advisor, the ALJ must have other evidence to support a decision to
25 reject the opinion of a treating physician, such as laboratory
26 test results, contrary reports from examining physicians, and
27 testimony from the claimant that was inconsistent with the
28 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,

1 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
2 Cir. 1995).

3 A. Physical impairments

4 Plaintiff contends that the ALJ failed to properly credit
5 the opinions of treating physicians Drs. Sikora and French. In
6 April of 2004, Dr. Sikora opined plaintiff's cervical, lumbar and
7 right shoulder pain caused marked limitations with respect to
8 lifting, carrying, sitting, standing and walking. (Tr. 277-278.)
9 As the Commissioner and the ALJ correctly observe, Dr. Sikora
10 opined plaintiff's overall work level was severely limited. (Ct.
11 Rec. 26 at 8, referring to Tr. 278.) Dr. Sikora limited
12 repetitive lifting to five pounds with the right hand and ten with
13 the left. He opined plaintiff needed to change positions every 5-
14 10 minutes. (Tr. 278, 286.)

15 The ALJ points out that while Dr. Sikora's assessment may
16 have been accurate in April of 2004, around the onset date of
17 April 15, 2004, plaintiff underwent a series of successful
18 surgeries after the opinion was rendered. (Tr. 24-26, 30.) The
19 record does not establish any continuous 12 month period of
20 disability as required by the Act. The ALJ notes Dr. French
21 performed an arthroscopic repair of plaintiff's right shoulder in
22 November of 2004. (Tr. 24, referring to Exhibit 25F at Tr. 457-
23 458.) The following month, Dr. French reported plaintiff was
24 doing very well. By March of 2005, plaintiff's neurologic
25 symptoms and neck tightness were significantly better. Plaintiff
26 had normal sensory examination in her right hand and did pretty
27 well with her right arm, although her left shoulder was worse.
28 (Tr. 25, referring to Tr. 487.)

1 Accordingly, on June 23, 2005, Dr. French performed an
2 arthroscopic examination and anterior Bankart repair on the left
3 shoulder. By September of 2005, Dr. French opined plaintiff was
4 doing very well and the prognosis was good. The ALJ notes Dr.
5 French recommended partial disability for six months for her left
6 shoulder limitations. Dr. French noted no right shoulder
7 neurologic symptoms. (Tr. 25, referring to Tr. 475-477, 486-492.)
8 Dr. French stated: "Off work for 2 to 4 weeks in sedentary work
9 only." (Tr. 477.)

10 The ALJ considered Dr. Sikora's recommendation that
11 plaintiff engage in non-physical labor in the future. Dr. Sikora
12 felt this was appropriate, in part, because plaintiff "(has [a]
13 business degree background.)" (Tr. 506.)

14 In March of 2006, Dr. French's nerve conduction studies
15 showed very mild results. He thought plaintiff might improve on
16 her own. (Tr. 25, referring to Tr. 493B.) The Appeals Council
17 considered Dr. French's post-hearing letter dated May 23, 2008.
18 (Tr. 595.) Dr. French indicated plaintiff's attorney had given
19 him a copy of the physical assessment by VE Robert Cornell:

20 It showed that Ms. Howes has severely impaired manual
21 dexterity and that she is below the tenth percentile in
22 all hand functions. Her assessment is consistent with
23 her persistent nerve symptoms and dystonia. The
24 assessment also supports her contention that she is
25 unable to maintain reasonably continuous full time
26 employment.

27 (Tr. 595.)

28 In May of 2007, VE Robert Cornell performed the vocational
evaluation relied on by Dr. French. (Tr. 186-189.) Mr. Cornell
notes plaintiff complains of numbness in both hands and in her
right arm. Currently she "does not take any medication." (Tr.

1 186.) At the beginning of testing, plaintiff indicted she was
2 experiencing some numbness and tingling in her right thumb and
3 arm. (Tr. 188.) She reported shoulder and neck pain beginning
4 early in the test. (Id.) Mr. Cornell indicates plaintiff's
5 dexterity test results are in the below average range for all
6 subtests. (Tr. 189.) He opined plaintiff would have difficulty
7 "functioning on [in] jobs that require use of the upper
8 extremities with regard to reaching, handling and fingering. . .
9 She would be precluded from pursuing jobs in the assembly,
10 packaging and sorting area. Jobs requiring using a computer would
11 be contraindicated." (Tr. 189.)

12 To aid in weighing the conflicting medical evidence, the ALJ
13 evaluated plaintiff's credibility and found her less than fully
14 credible. (Tr. 29.) Credibility determinations bear on
15 evaluations of medical evidence when an ALJ is presented with
16 conflicting medical opinions or inconsistency between a claimant's
17 subjective complaints and diagnosed condition. *See Webb v.*
18 *Barnhart*, 433 F. 3d 683, 688 (9th Cir. 2005).

19 It is the province of the ALJ to make credibility
20 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
21 1995). However, the ALJ's findings must be supported by specific
22 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
23 Cir. 1990). Once the claimant produces medical evidence of an
24 underlying medical impairment, the ALJ may not discredit testimony
25 as to the severity of an impairment because it is unsupported by
26 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
27 1998). Absent affirmative evidence of malingering, the ALJ's
28 reasons for rejecting the claimant's testimony must be "clear and

1 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
2 "General findings are insufficient: rather the ALJ must identify
3 what testimony not credible and what evidence undermines the
4 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
5 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

6 The ALJ relied on several factors when he assessed
7 credibility: inconsistent statements, activities inconsistent with
8 degree of impairment alleged, lack of physical findings on
9 examination, and noncompliance with medication. (Tr. 29-30.)

10 The ALJ notes plaintiff testified she lies around during the
11 day and watches television; the record does not indicate plaintiff
12 is medically limited to this extent. (Tr. 29.) The court notes
13 that in her report supporting the most recent application,
14 plaintiff indicated she shops for groceries twice per month, pays
15 all of the bills for the household (she lived with her son at the
16 time), watches television for 2 hours, naps, drives, reads, and
17 has no hobbies. (Tr. 158-161.) The ALJ notes plaintiff
18 inconsistently told examining psychologist Dr. Pollack she lost
19 her last job after testing positive for THC, and told another
20 examining psychologist (Debra Brown, Ph.D.) she quit to undergo
21 surgeries. (Tr. 29.) MRI's of plaintiff's thoracic and lumbar
22 spine showed only mild findings; the cervical spine showed mild to
23 moderate disc bulges, but no neurological compromise. Motor,
24 sensation and reflexes test results are normal. (Tr. 30.)

25 The ALJ relied on plaintiff's statement to Dr. Brown in May
26 of 2004 that she enjoyed baking, camping and walking. She
27 performed housekeeping chores without any problems. (Tr. 29,
28 referring to Exhibit 13F at Tr. 282-283.) The ALJ notes at Tr. 29

1 that plaintiff's treating physician, Dr. Sikora, "eventually fired
2 her from practice for violating her pain contract" after
3 urinalysis tests for marijuana were positive. (See Tr. 451:
4 positive test for cannabinoids on May 19, 2004, and Tr. 449: same,
5 on December 15, 2004.) The ALJ's reasons for finding plaintiff
6 less than fully credible are clear, convincing, and fully
7 supported by the record. See *Thomas v. Barnhart*, 278 F. 3d 947,
8 958-959 (9th Cir. 2002)(proper factors include inconsistencies in
9 plaintiff's statements, inconsistencies between statements and
10 conduct, and extent of daily activities). Noncompliance with
11 medical care or unexplained or inadequately explained reasons for
12 failing to seek medical treatment also cast doubt on a claimant's
13 subjective complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v.*
14 *Bowen*, 885 F. 2d 597, 603 (9th Cir. 1989).

15 The ALJ considered the records and opinions of other treating
16 doctors and examining psychologists when he weighed Dr. Sikora's
17 opinion. None assessed any impairment similar to Dr. Sikora's.

18 To the extent the ALJ rejected the contradicted marked
19 impairments assessed by Dr. Sikora, he did so for several reasons:
20 (1) the 2004 opinion became outdated following plaintiff's
21 successful surgeries; (2) Dr. Sikora opined plaintiff was capable
22 of work as long as it is "non-physical," meaning he did not find
23 her unable to work, despite the assessed marked limitations; (3)
24 the results of objective testing do not support marked impairment,
25 and (4) plaintiff's admitted activities are inconsistent with Dr.
26 Sikora's assessed marked limitations. (Tr. 23-26, 29-30,
27 referring to Exhibts 9F, 28F, 29F.) These reasons are specific,
28 legitimate, and fully supported by the evidence. See *Lester v.*

1 *Chater*, 81 F. 3d 821, 830-831 (9th Cir. 1995) (holding that the
2 ALJ must make findings setting forth specific, legitimate reasons
3 for rejecting the treating physician's contradicted opinion).

4 With respect to Mr. Cornell's opinion, the Commissioner
5 accurately observes that he is not an acceptable medical source.
6 (Ct. Rec. 26 at 12.) In addition, there is no showing that this
7 opinion could not have been obtained earlier and presented to the
8 ALJ for his consideration.

9 This court has jurisdiction to remand matters on appeal for
10 consideration of newly discovered evidence. *Goerg v. Schweiker*,
11 643 F.2d 582, 584 (9th Cir. 1981); 42 U.S.C. § 405(g). Section
12 405(g) expressly provides for remand where new evidence is
13 material and there is good cause for the failure to incorporate
14 the evidence in a prior proceeding. *Burton v. Heckler*, 724 F.2d
15 1415, 1417 (9th Cir. 1984). To meet the materiality requirement,
16 the new evidence must bear directly and substantially on the
17 matter. *Id.* If new information surfaces after the Secretary's
18 final decision and the claimant could not have obtained that
19 evidence at the time of the administrative proceeding, the good
20 cause requirement is satisfied. *Booz v. Secretary of Health and*
21 *Human Services*, 734 F.2d 1378, 1380 (9th Cir. 1984). At a
22 minimum, such evidence must be probative of mental or physical
23 impairment. *Hall v. Secretary of Health and Human Services*, 602
24 F.2d 1372, 1377 (9th Cir. 1979).

25 Plaintiff's "new evidence" includes a letter written by VE
26 Mr. Cornell dated May 1, 2007 - nearly a year after the first
27 hearing, and four months before the second ALJ hearing. Relying
28 on this letter, Dr. French opined on May 23, 2008, that Mr.

1 Cornwell's vocational assessment shows plaintiff has "severely
2 impaired manual dexterity and that she is below the tenth
3 percentile in all hand functions." (Tr. 595, relying on Tr. 189.)
4 The Appeals Council admitted Dr. French's 2008 letter as an
5 additional exhibit. (Tr. 12, 595.) Plaintiff, however, offers no
6 reason why she had not solicited this information from Dr. French
7 earlier so that the ALJ could consider it. The obvious explanation
8 is that when she failed to succeed on her disability claim in the
9 agency hearings, she sought out a new favorable opinion to better
10 support her position. The "good cause" requirement would "be
11 meaningless if such circumstances were sufficient to allow
12 introduction of new evidence." *Allen v. Secretary of Health and*
13 *Human Services*, 726 F.2d 1470, 1473 (9th Cir. 1984).

14 Since plaintiff failed to meet the "good cause" requirement,
15 the court declines remanding the case for consideration of new
16 evidence.

17 To be material, the new evidence must bear directly and
18 substantially on the matter in issue. *Key v. Heckler*, 754 F.2d
19 1545, 1551 (9th Cir. 1985). Also, there must be a reasonable
20 possibility that the new evidence would have changed the outcome
21 if it had been before the Secretary. *Booz v. Secretary of Health*
22 *and Human Services*, 734 F.2d 1378, 1380-81 (9th Cir. 1984).

23 The materiality inquiry does not apply when the Appeals
24 Council has already made the new evidence part of the record. See
25 *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000) (when
26 claimant submitted additional materials to the Appeals Council in
27 requesting review of the ALJ's decision, "[w]e may properly
28 consider the additional materials because the Appeals Council

1 addressed them in the context of denying Appellant's request for
2 review"). See also *Heckler*, 724 F.2d 1415, 1417 (9th Cir. 1984)
3 ("a remand to the Secretary to consider additional evidence not
4 contained in the administrative record . . . [is] provided for by
5 [42 U.S.C. § 405(g)] where the new evidence is material and there
6 is good cause for the failure to incorporate such evidence in the
7 record in a prior proceeding.").

8 Plaintiff fails to show good cause for not having obtained
9 and offered the evidence earlier. A claimant does not meet the
10 good cause requirement by merely obtaining a more favorable report
11 once his or her claim has been denied. To demonstrate good cause,
12 the claimant must demonstrate that the new evidence was
13 unavailable earlier. *Key v. Heckler*, 754 F.2d 1545, 1551 (9th
14 Cir.1985) ("If new information surfaces after the Secretary's
15 final decision and the claimant could not have obtained that
16 evidence at the time of the administrative proceeding, the good
17 cause requirement is satisfied").

18 Plaintiff fails to explain why she did not seek or could not
19 have obtained a medical evaluation of her manual dexterity, such
20 as Dr. French's post-decision letter of May 23, 2008, before the
21 ALJ hearing. (Tr. 595.)

22 In addition, Dr. French's post-decision opinion refers to
23 plaintiff's nerve symptoms, which the ALJ found were treated or
24 not supported by objective testing. An exam in March of 2005,
25 almost a year after onset, showed right hand sensory as normal
26 (Tr. 24, referring to Exhibits 25F, 26F and 28F). Nerve
27 conduction studies in March of 2006 showed evidence of a pronator
28 cubital tunnel and carpal tunnel, mostly on the left. Plaintiff

1 had bilateral brachial plexus residuals from her shoulder
2 subluxation, which were basically very mild. Dr. French opined
3 plaintiff might get better on her own (Tr. 25, referring to
4 Exhibit 28F). Nerve conduction studies in June of 2007 were
5 consistent with carpal tunnel syndrome on the right and bilateral
6 cubital tunnel syndrome (Tr. 27, referring to Exhibit 41F). The
7 ALJ states that plaintiff "has had carpal tunnel surgery on her
8 right wrist, with nerve conduction studies showing a continued
9 carpal tunnel syndrome, which would limit her ability to lift and
10 carry." (Tr. 30.) Accordingly, the ALJ took these limitations
11 into account when he assessed plaintiff's RFC, and limited
12 reaching overhead with either hand to occasionally. (Tr. 28.)

13 In addition, the court notes plaintiff's Tinnel test on the
14 right was mildly positive in 2001 and she did not appear to be a
15 surgical candidate (Tr. 410-411). On March 13, 2002, plaintiff
16 sought referral from Dr. Sikora for carpal tunnel release
17 surgeries on both her left and right wrists. (Tr. 429.) She
18 returned May 8, 2002, having seen none of the physicians to whom
19 she was referred by Dr. Sikora, including Dr. Derby for CTS. (Tr.
20 433.)

21 Again, on November 26, 2002, plaintiff advised Dr. Sikora she
22 had not seen Dr. Derby for CTS. Dr. Sikora gave her a new
23 referral to Dr. Clark for repeat nerve conduction studies (Tr.
24 339-440). Right carpal tunnel release was performed in 2003, with
25 the left planned in the near future. (Tr. 235.) On November 12,
26 2003, plaintiff opined that because the carpal tunnel release
27 performed on the right wrist did not work, she declined the
28 surgery on her left wrist. (Tr. 441). In 2005, Dr. French opined

1 plaintiff could perform sedentary work only for 2-4 weeks, she
2 would be "partially disabled" due to recovering from shoulder
3 surgery, and her prognosis was good. (Tr. 477.) On May 7, 2006,
4 Dr. French noted plaintiff had been assaulted. She "gets numbness
5 in both hands that is not clinically clear." (Tr. 559.)

6 The ALJ is responsible for reviewing the evidence and
7 resolving conflicts or ambiguities in testimony. *Magallanes v.*
8 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
9 trier of fact, not this court, to resolve conflicts in evidence.
10 *Richardson*, 402 U.S. at 400. The court has a limited role in
11 determining whether the ALJ's decision is supported by substantial
12 evidence and may not substitute its own judgment for that of the
13 ALJ, even if it might justifiably have reached a different result
14 upon de novo review. 42 U.S.C. § 405 (g).

15 The ALJ's assessment of the opinions of treating physicians
16 and of plaintiff's credibility is supported by the record and free
17 of legal error. To the extent the ALJ discounted some of the
18 conflicting medical opinions, his reasons are specific, legitimate
19 and supported by the record.

20 B. Psychological impairments

21 Plaintiff alleges the ALJ improperly discounted Dr. Pollack's
22 assessed marked limitations. (Ct. Rec. 21 at 18-20.) In addition
23 to Dr. Pollack's opinion, the ALJ considered the May 2004 opinion
24 of examining psychologists Debra Brown, Ph.D., and Shawn Horn,
25 Psy.D., that plaintiff did not endorse symptoms to meet the DSM-IV
26 criteria for mental illness. (Tr. 24.) They examined plaintiff
27 shortly after onset:

28 Ms. Howes reported she is unable to work due to multiple
medical problems. She stated she hoped GAU would enable

1 her to have 'shoulder surgery' and to receive 'grief
2 counseling.' She reported she requires surgery on her
3 shoulder, has arthritis, [a] pinched nerve in her back,
4 'numbness and tingling in her hands' and 'thoracic outlet
5 syndrome.' She reported the onset of her physical problems
6 began in 1991 following her 'first motor vehicle accident.'
7 She reported having a history of 'four car
8 wrecks and one slip and fall.' She reported she is
9 currently applying for SSI, which she has been denied
10 'three times.'

11 In addition to the medical difficulties listed above, she
12 reported experiencing headaches, nausea, PMS and fainting
13 spells. She reported being on multiple medications for
14 her physical health (which include 30 mg of morphine and
15 40 mg of percocet) and zoloft 'for depression.' She
16 reported experiencing 'depression' since her son died on
17 July 13, 2001. She reported a truck hit her fifteen-
18 year-old son at that time. Since then she has
experience[d] grief. Reported symptoms include frequent
crying. She denied any difficulties with sleep or
appetite and did not endorse symptoms to meet DSM-IV
criteria for Depression.

19 . . . She reported graduating from high school and has
20 'three degrees' in 'credit and finance management,
21 general business, and business occupation.'

22 . . . She has no problems with money management or
23 housecleaning. . . She enjoys baking, camping and
24 walking. A typical day includes getting her son 'off
25 to school, I lay back, read a paper, call friends,
26 putter around the house and clean dishes.' She reported
27 she is physically unable to move until she takes her
28 medications.

Ms. Howes did not endorse symptoms to meet DSM-IV
criteria for mental illness. Due to this fact I am
unable to identify any mental health problems that would
interfere with her ability to work at this time. I recommend
a medical evaluation to determine if
her reported difficulties are valid. If no medical
issues are found, a diagnosis of somatic or conversion
disorder would be indicated.

I do not recommend an SSI track.

(Tr. 280-283.)

The ALJ points out that the May 2006 opinion of Dr. Pollack
is internally inconsistent, because he opined plaintiff has marked
limitations (of pace and the ability to perform activities within
a schedule), yet he assessed a GAF of 60, indicating only mild to

1 moderate symptoms. (Tr. 25, referring to Exhibit 31F at 515,
2 517.) Contrary to plaintiff's argument, the ALJ's reasons for
3 discounting Dr. Pollack's opinion are specific, legitimate, and
4 supported by substantial evidence.

5 **CONCLUSION**

6 Having reviewed the record and the ALJ's conclusions, this
7 court finds that the ALJ's decision is free of legal error and
8 supported by substantial evidence.

9 **IT IS ORDERED:**

10 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 25**) is
11 **GRANTED.**

12 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 20**) is
13 **DENIED.**

14 The District Court Executive is directed to file this Order,
15 provide copies to counsel for Plaintiff and Defendant, enter
16 judgment in favor of Defendant, and **CLOSE** this file.

17 DATED this 11th day of June, 2009.

18 s/ James P. Hutton
19 JAMES P. HUTTON
20 UNITED STATES MAGISTRATE JUDGE
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